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ABSTRACT

This document traces the development of Federal Communications Commission (FCC) network regulations from their beginning in 1941 with the "Report on Chain Broadcasting." The eight rules defined by the report were aimed at correcting network abuses and were intended to maintain community broadcasting in the public interest. The document discusses the 1957 Barrow Report on television networks and the 1960 FCC program policy statement on prime time access rules; considers, in chronological order, complaints from consumer groups and rival broadcasters, judicial proceedings, and proposed congressional actions; and discusses current problems that have prompted a new look at the network controls behind television, as well as proposed legislation for regulation and control similar to the first report. (HAI)

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FREEDOM OF INFORMATION CENTER REPORT NO. 383

NETWORK DIFFICULTIES: STAND BY

This report was written by Richard L. Oborn, who recently received an M.A. degree from the University of Missouri School of Journalism.

Editor's Note: Since this report was written, the FCC's network inquiry remains off-track awaiting direction by the new Carter-appointed FCC chairman. However, NBC has agreed to a Justice Department consent decree that imposes restrictions on the network in its dealings with program producers. Portions of the decree will not become effective until CBS and ABC accept similar restrictions.

Introduction

> It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.[1]

Thus spoke the United States Supreme Court in 1969. The statement's reference to broadcasters' inviolate First Amendment right came after a history of Federal Communications Commission (FCC) actions regulating broadcasting. The quotation is recalled now as the FCC begins a new inquiry into television network practices.

This paper is concerned particularly with the history of FCC regulation of broadcasting networks. Specific regulatory antecedents include the communications acts. After a brief history of those antecedents and some historical facts about the beginning of network broadcasting, the genesis of network regulation, **Report on Chain Broadcasting,** will be discussed. The chronology follows through the Barrow Report on television networks and the 1960 FCC programing policy statement to the prime time access rules, ending with the current inquiry into network television.

History

The first congressional act relating to radio occurred in 1910. It actually was not an attempt to regulate the new "wireless," but a measure to prevent unnecessary loss of life at sea by requiring a wireless aboard ships carrying more than 50 persons and traveling at least 200 miles between ports.[2] The Radio Act of 1912 required that a station be licensed by the secretary of commerce and labor. A 1912 attorney general's opinion (Opinion 579) denied vesting discretionary power over issuance of licenses in the secretary. He could seek only self-regulatory control by various stations — not very far-reaching powers.

The Radio Act of 1927 instituted the first regulation system and was considered drastic at the time. The act established a three-year limit on broadcast licenses, which is still in effect, and an offer of renewal whenever "the public interest and necessity will be served thereby." The regulations actually were requested by broadcasters at the Fourth National Radio Conference in November 1925. While delegates agreed that government regulatory powers should center on technical matters, Congress went further. Secretary of Commerce Herbert Hoover commented, "I think this is probably the only industry of the United States that is unanimously in favor of having itself regulated."[3] The act implicitly delegated any censorship powers to radio operators and denied them to government. The provision carried over to the Communications Act of 1934.

Broadcasting's tremendous growth prompted a revamping of regulations — the Communications Act of 1934. Section 326 of the act explicitly classified broadcasting as a form of communication covered by the word "speech" in the First Amendment:

> Nothing in this chapter shall be understood or construed to give the Commission power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

Subsequent regulations have led many broadcasters to question the efficacy of Section 326.

Network radio began Jan. 4, 1923. A special telephone line connected WEAF in New York with WNAF in Boston for a simultaneous broadcast of a five-minute saxophone solo.[4]

Summary: This report traces the development of FCC network regulations from their genesis in 1941 with the **Report on Chain Broadcasting.** Complaints from consumer groups and rival broadcasters, judicial proceedings and proposed congressional action have now prompted a new look at the network controls behind television.

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Technically speaking, network broadcasting involves the simultaneous transmission of identical programs by a group of interconnected stations. The first permanent circuit was established the same year between WEAF and WMAF in South Dartmouth, Mass.[5] During the next 10 years, organizations formed to take advantage of the opportunity to sell national advertising by being able to offer air time to manufacturers simultaneously in key cities across the United States. Heated competition followed to secure contracted promises from independent stations to make available air time for network programs.

NBC became the first formal major network in 1926, when 19 radio stations across the country carried a play-by-play broadcast of the Rose Bowl football game in Pasadena. The nucleus for what became known as the NBC Red network was AT&T's WEAF network, purchased for $1 million in September 1926.[6] About a year later, CBS entered the field with 16 stations, and shortly thereafter, so did NBC's second network, the Blue. Despite the growth of numerous regional networks, until 1941 these three dominated nationwide broadcasting. The Mutual Broadcasting System was born in 1941 when two regional networks combined.[7]

Movement Toward Regulation

Llewellyn White's broadcast report for the Commission on Freedom of the Press found government intervention had been carefully limited to avoid interference with free expression on public affairs: a government license had not meant government censorship.[8] Nonetheless, during the 1930s congressional concern mounted over monopolistic tendencies in the radio industry and legislative criticism increased of the FCC's apparent complacency in the face of these tendencies. In 1937 four resolutions calling for an investigation of broadcast monopolistic practices were pending in Congress.[9] Domination of the air by broadcasting networks, newspaper ownership of radio stations, widespread trafficking in broadcast licenses and a concentration of control in the radio manufacturing industry were all condemned on the floor of Congress. In 1937 Sen. Wallace Humphrey, R-Maine, demanded a Senate investigation.[10] The Mutual Broadcasting System appealed for government aid in blasting the networks loose from their favored positions. President Franklin Roosevelt prodded the FCC to act.

The Beginning (Chain Broadcasting Report)

After internal reorganization and appointment of a new chairman, Frank McNinch, the FCC began its investigation March 18, 1938.[11] Included in the investigation was whether the public interest required special rules for radio stations engaged in chain broadcasting. A committee of three commissioners was formed to supervise the investigation, hold hearings and make recommendations to the full commission. The committee held hearings from November 1938 to May 1939 and heard 96 witnesses, compiled 9,713 pages of testimony and received 707 exhibits. It submitted its report on June 12, 1940.[12] During the remainder of 1940, networks and others filed briefs and presented oral arguments before the FCC.

The FCC sent the Justice Department 1,300 pages of the report and the antitrust division announced Nov. 29, 1940, that it would investigate charges of monopolistic practices.[13] Sen. John Chandler Gurney, R-S.D., defended the networks and charged that those who proposed network regulations were crazy: "Apparently some of its [FCC] members have eaten the loco weed and have construed its strange effects as giving the commission power far in excess of that bestowed upon it by Congress."[14] During oral arguments in December 1940, the networks said that exclusive contracts were the core of any competitive business and not harmful to affiliates.

On the last day of December 1940, the Justice Department filed two civil suits (one each against CBS and NBC) in the Chicago federal district court to break up the alleged monopolistic holdings.[15] NBC agreed to put its Red and Blue networks under separate management. (The later FCC report required total divestiture and the Blue was sold.)

The **Report on Chain Broadcasting** was released on May 2, 1941, summarizing the 27-volume investigative record.[16] Eight new regulations were to become effective in 90 days. More than two years later, modified chain broadcasting rules finally were applied to AM stations. FCC Chairman James Fly said the regulations could be called the Magna Carta for American broadcast stations. The report found that by the end of 1940, 465 stations were affiliated with CBS, NBC or Mutual. At the end of 1938, less than three percent of the nation's total nighttime broadcasting power had been utilized by stations not affiliated with one of the networks.[17] The report found eight network abuses and, since the FCC could not directly regulate networks, the regulations were phrased to apply to station licensees. The regulations precluded granting a license to a station that engaged in any of the following practices:[18]

1. If the station had a network contract that prevented it from broadcasting programs of any other network. This is exclusivity of affiliation. The practice resulted in millions of Americans not being able to hear the 1939 World Series baseball games carried by Mutual, because CBS and NBC decided not to purchase broadcast rights from Mutual and forbade network affiliates to carry the games.[19]

2. If a station had a network contract that prevented another station serving substantially the same area from broadcasting network programs not taken by the former station. This is territorial exclusivity.

3. If a station had a contract with a network for longer than one year. The report found CBS and NBC affiliates were bound for five years but the networks for only one year.

4. If a station optioned time to the networks. CBS kept an option on substantially all the more desirable broadcast hours of its outlets, which could be activated on 28-days notice. NBC optioned the choice hours of most of its stations, totaling eight and one-half hours on weekdays, eight hours on Sundays. The time under option vastly exceeded time actually used by the networks.[20] The FCC believed this could prevent a station from developing local programs.

5. If the station did not have the right to reject network programs that it reasonably believed to be unsuitable or to substitute another program for a network program when it was of outstanding local or national importance.

6. If the station was affiliated with a network and the network owned another station in the same area as the applicant, where existing stations were so few or of such equal desirability that competition would be substantially restrained. The report found that NBC was the licensee of 10 stations, including stations in New York, Chicago, Washington and San Francisco. CBS had licenses for eight.[21]

7. If the station had a contract with a network that maintained more than one network. The report found that ownership of two networks, the Red and the Blue by NBC, concentrated excessive power in the hands of one network management and constituted a restraint of competition. NBC

was required to divest itself of one network.

8. If a station had a network contract that prevented it from fixing its own rates for time other than for network programs. The NBC affiliate contract allowed the network to reduce compensation to the station if the station set a lower than network rate for national advertising. This was designed to keep the station from advertising with its own time.

The report concluded:

> We have exercised our jurisdiction upon the premise, generally accepted by the public and the industry, that the network method of program distribution is in the public interest. We subscribe to the view that network broadcasting is an integral and necessary part of radio. The regulations which we are promulgating are designed to preserve without loss the contribution of network broadcasting to the public and to affiliate stations, while ensuring that licensees will exercise their responsibility under the law. We believe that these regulations will foster and strengthen network broadcasting by opening up the field to competition.[22]

Anticipating network reaction, the report continued:

> Radio broadcasting is a competitive industry. . . . If the industry cannot go forward on a competitive basis, if the substantial restraints upon competition which we seek to eliminate are indispensible to the industry, then we must frankly concede that broadcasting is not properly a competitive industry.[23]

The latter thought broaches the possibility of total government control through making broadcasting a public utility, if the industry is unwilling or unable to live by FCC regulations.

The commission accepted the report by a 5-2 vote. Commissioners T.A.H. Craven and Norman Case said the system was threatened with ruination. The networks would be replaced by an "unwholesome conglomeration of opportunistic timebrokers catering to an aggregation of local monopolies in various towns and cities."[24]

As expected, the networks raised a storm of protest, complaining that the rules would:

1. Threaten the continuation of existing broadcast services and bring confusion to both listeners and stations.

2. Threaten the continuation of such sustaining programs as New York Philharmonic Symphony broadcasts and world news service.

3. Establish radio monopolies in many sections of the country then being served by competing stations.

4. Weaken the ability of the radio industry to give the type of service people had come to demand.

5. Encourage government to take over broadcasting altogether.

6. Cripple, if not paralyze, broadcasting as a national service at a time when radio should have been encouraged to continue and enlarge its contribution to national unity and morale.[25]

The protests and requests for reconsideration by the networks succeeded in forcing the FCC to defer implementation of the rules until Oct. 11, 1941.[26] The FCC then issued a **Supplemental Report on Chain Broadcasting,** generally affirming the rules but relaxing certain provisions. The commission (1) added to the "territorial exclusivity" rule a proviso that a station might have "first call" on network programs within its primary service area; (2) lengthened the permissible affiliation term to two years; and (3) permitted time-optioning no more than three hours in each of four segments into which the broadcast day was divided (8 a.m.-1 p.m., 1-6 p.m., 6-11 p.m. and 11 p.m.-8 a.m.) on no less than 56-days notice, but not as a means of excluding other networks.[27]

NBC and CBS filed suit Oct. 30 and 31 in the southern district of New York to set aside the chain broadcasting regulations. Mutual eventually entered the case as a friend of the court. On Nov. 12 the FCC postponed its regulations pending the court's decision. The district court did not wish to handle the matter, and it eventually reached the Supreme Court docket in March 1942. The Supreme Court said on June 1 that the problem was entitled to a court review and sent the case back to the lower court. On Nov. 17, 1942, the district court ruled in favor of the FCC and the Supreme Court affirmed that decision on May 10, 1943.

National Broadcasting Company, Inc. v. FCC (319 US 190) became the seminal case for the measure of constitutionality of FCC regulations. Its importance lies not in the specific regulations upheld but in Justice Felix Frankfurter's sweeping pronouncements on the comprehensive powers that Congress gave the FCC and his almost equally broad pronouncements on the constitutionality of the FCC's exercise of such powers.[28] Those powers derived from the Communications Act of 1934 and authorized the FCC to issue licenses if "public convenience, interest or necessity" would thereby be served.

Frankfurter rejected a challenge to FCC power on First Amendment grounds: "Unlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation."[29]

A more ominous statement was part of the dicta but is being accepted as law: "But the Act does not restrict the commission merely to supervision of the traffic. It puts upon the commission the burden of determining the composition of that traffic."[30]

After winning the industry's court appeal, on June 15, 1943, the FCC implemented rules for chain broadcasting (networks) for AM stations. Two years later, the rules applied almost verbatim to the new FM and television services.

However, as the networks discovered, the sky did not fall. Broadcasting was not visited with ruination. FCC Chairman Fly said unfavorable comments from the industry were "just a lot of hooey."[31] In 1947 White said, "The real defect of chain regulations may have been that they accomplished so little of tangible good."[32]

One of the report's rules became a reality Aug. 10, 1943, when NBC filed an application for sale of its Blue network to a corporation called American Broadcasting System, owned by Edward J. Noble. The sale was completed Oct. 12, 1943. The new company ultimately became the ABC radio and television network, in 1953 merging with United Paramount Theatres, Inc.[33]

The Barrow Report

Congressional concern about the power of networks continued with the introduction in the early 1950s of bills (S. 3546 and H.R. 9700) providing for direct FCC regulation of networks. Following congressional mutterings, on July 20, 1955, the FCC by right of Public Law 112 of the 84th Congress began the study of radio and television network broadcasting.[34] The

FCC delegated to four commissioners the powers necessary to conduct the study. The chairman was George C. Connaughey and the commissioners were Rosel H. Hyde, Robert T. Bartley and John C. Doerfer. The committee assembled the network study staff, composed of professional persons from within the commission and experts in various areas from outside. The director was Dean Roscoe L. Barrow of the University of Cincinnati Law School. A special appropriation of $80,000 from Congress provided initial funding for the group.

The FCC believed that such a study was necessary because the Communications Act of 1934 was enacted prior to the advent of television and no amendments had addressed problems raised by growth of the new industry. The chain broadcasting rules of 1943 were carried over to television with little change. But did the rules apply equally and correctly to both network types? During the preceding 15 years, no study had determined to what extent the rules had been rendered obsolete. The greater scarcity of television outlets (one-sixth the number of radio stations) created a special problem. The cost of television programing was several times that of radio. The higher cost made stations more dependent on networks for programing.

The study staff premised the investigations on a general philosophy accepting an advertising-supported network system. The study would recommend only minimal changes, those necessary to attain optimum broadcasting performance in the public interest under the existing system.

The study basically concerned itself with the broad question of whether the networks' relationships with their affiliates tended to foster or to impede the growth of a nationwide competitive radio and television broadcasting industry. The basic problem considered was: "Is there effective competition; if not, whether the public interest is served by legislation or administrative rules designed to assure more effective competition."[35] Specifically, what was the opportunity for and the economic feasibility of developing a multiple network structure in terms of "(1) the number of broadcast outlets available, (2) national advertising potential, (3) costs of network establishment and operations and (4) other relevant factors."[36] Because of limitations of time and staff, the study concentrated on the more pressing problems in television.

The study staff conducted extensive investigations through 1956 and the first part of 1957 with searches of network files, interviews with those in the industry and extensive questionnaires of networks, stations, program suppliers, advertisers and agencies. Cooperation was reportedly excellent.[37] Some independent program producers and distributors resisted supplying information for fear their business practices would become available to competitors and economic injury would result. However, the authority of the FCC to obtain the information was upheld in district court. But time was lost and some issues of programing were postponed to be the subject of a supplemental report.

The network study committee received the completed **Report on Network Broadcasting** on Oct. 3, 1957. It was released by the FCC and forwarded to Congress on October 10. It was later printed by the House Commerce Committee as House Report No. 1297, 85th Congress, 2nd Session. The 737-page report is often referred to as the Barrow Report after Dean Barrow.[38]

The Barrow Report concluded with 37 recommendations. One asked for a further in-depth study of radio networks, and three others concerned assumption by the FCC of authority to regulate networks directly. Seven others related to multiple ownership concepts that would treat networks like any other multiple owner. Of 26 recommendations directly dealing with network abuses, three related to networks' option-time and "must-buy" practices, 13 to affiliation matters, seven to rate compensation matters and two to interconnection.[39] The FCC decided to obtain a formal opinion from the Justice Department on the antitrust aspects of certain network practices discussed in the report. Thirty-two stations were found possibly violating the chain broadcasting rules.[40]

The Barrow Report said the FCC emphasizes broadcasting in the public interest. The essence of such service is programing. Three basic policy themes are sought: competition, diversification of station ownership and licensee responsibility. The FCC wants to maximize service, program viewpoints and opinion sources, to provide the best practicable service to the community served. The network study conceded the business function of a network is to provide a national advertising medium.

However, in one significant dimension — the proportion of network programs during prime evening hours on television stations throughout the country — network concentration was very high. For example, during three prime evening hours subject to network option, 8 p.m. to 11 p.m., the three networks had a high proportion of national television time sales — 70 percent.[41] Networks had a high concentration in total industry assets, total revenues and the proportion of network-produced programs shown on networks. Primary obstacles to entry of new networks were threefold: network-station affiliate structure, AT&T rates and lines, and the economy of large-scale operations.

At the time of the study, the principal potential competition with the networks had to come from the national spot advertising system of broadcasting, advertisers who decided to obtain a national audience by sponsoring a program. Such a program would be chosen from network or independent offerings, with the networks then clearing the time — receiving agreement to carry the show — with affiliates. Or, an advertiser could opt for national spot advertisements. Time would be cleared through national station representatives, some of which were the networks themselves. Independent station representatives competed with network station representatives for network time. The network station representation practice created within the network an inherent conflict of interest that produced the likelihood that full and effective competition between networks and national spot television might not prevail.[42]

The report found that affiliation largely determined a station's economic well-being and its program service to the public. This economic factor worked in the networks' favor when bargaining with most stations. The program factor had implications for the licensees' programing responsibility. The network preference for large markets and unduplicated station circulation impinged upon the FCC policy of fostering a national, competitive broadcast system. The report recommended that when an affiliate rejected a program, the network be required to attempt to place the program on another station in the same area.

The option-time practice was found to limit the station's responsibility to select programs. Program responsibility devolved to the networks since broadcasters were required to carry programs they otherwise might not have. The report decided, "It is not apparent option time is necessary to network operations. Mutual interests assure reasonable cooperation."[43]

Networks established time rates of each affiliate for sales

to network advertisers. That was acceptable, but using rate decisions as a lever in obtaining clearances for programs was not. Networks should publish their procedures and publicly circulate their rate changes, the report said. And networks should get out of advertising representation except for their own owned-and-operated stations.

Networks received 70 percent of a station's national advertising revenues as compensation for programing and producing viewing fare. The report said use of station compensation to affect station program clearances should be remedied by making affiliation contracts public.

CBS and NBC required network advertisers to include in an order a group of about 55 stations, designated by call letter.[44] Individual stations were willing to concede much to be on a network's "must-buy" list. The station might be induced to take programs it otherwise would not carry. The report would prohibit the practice.

The Barrow Report's final major concern dealt with multiple ownership. The First Amendment concept and FCC doctrine point to a one-to-a-customer ideal. However, the report found that of the 185 VHF stations in the top 100 markets, 104 (56 percent) were multiple owned; 33 percent of the 52 UHF stations were multiple owned. That multiple owners concentrated on large, profitable markets was apparent. In November 1956, 70.7 percent of VHF stations in the top 25 markets served more than one-half the U.S. population. Between January 1954 and January 1956, multiple ownership in the top 100 markets increased from 41 percent to 50 percent.[45] Thus, the image of a single station owner devoting his efforts to serving the single community to which he was licensed was a myth for most of the U.S. listening audience. The report stated that network owned-and-operated stations were no longer needed to sustain network revenue and recommended treating networks as any other multiple station owner. Each owner would be allowed no more than three VHF stations in the top 25 markets.

The report found some network practices contrary to public interest and recommended finally the need for Congress to apply chain broadcasting rules directly to networks. "The networks, which are the strongest decision-making component in the television industry, should be answerable to the viewing public through commission policies expressing public interest."[46]

To ensure continued study of the networks' effects on broadcasting, the Office of Network Study was established within the FCC Broadcast Bureau in late 1957.

In March through July 1958, letters of reprimand for violations of network rules went to networks and to licensees in three instances. One was for violation of the territorial exclusivity rule; two were violations by a network in improperly using the power to change a station's network rate.

By public notice Jan. 8, 1958, the commission began a hearing concerning the Barrow Report's recommendations. Network officials and many others testified during the hearing from April through late July 1958.[47]

Action on Barrow Report Recommendations

The years following the Barrow Report bore witness to actions implementing some of the recommendations. On Jan. 28, 1959, a commission Notice of Proposed Rule Making invited comments on a proposal to prohibit a television network from representing in national spot sales any television stations other than those it owned. Opposition to the proposed rule took the FCC to court. On March 2, 1961, a District of Columbia appeals court upheld the FCC's authority to make such a rule under the precedent established in NBC v. U.S.[48] The prohibition was adopted in October 1959 but networks had until Dec. 31, 1961, to comply. It is now Section 73.658 (i) of the rules.[49]

After Barrow Report recommendations and testimony during 1958, the FCC found on Jan. 14, 1959, that option time was essential to networking and therefore in the public interest. The findings were submitted to the attorney general for his views on applicability of antitrust laws to the option-time practice. (Option time is the term used to designate certain hours of a broadcast day during which network affiliate stations contract to carry sponsored network programs.) The assistant attorney general for the antitrust division said on Feb. 27 that option time "runs afoul" of the Sherman Antitrust Act.[50] On April 23 the FCC began a rule-making proceeding aimed at tightening the rules. The new rule was designed to improve the "competitive position of other groups affected by option time and the freedom of program selection of stations under affiliate contract, while maintaining essential features of option-time practice."[51]

The FCC amended the option-time rule on Sept. 14, 1960, by cutting permissible option time from three hours to two and one-half hours in each day. The Times Mirror Broadcasting Co. appealed the FCC ruling and the FCC obtained a remand order for further proceedings. On April 19, 1961, the FCC withdrew its 1960 ruling pending a reconsideration hearing, which occurred Dec. 4, 1961. After studying the record, the FCC concluded on May 23, 1963, that option time was not essential to successful television network operations. The commission decided the practice "restrains freedom of choice of licensees as to what programs to present and at what time to present them, and restricts access by non-network groups to desirable evening time."[52] Petitions to reconsider were denied and the new rule [Section 73.658(d)] became effective Sept. 10, 1963. Radio networks had significantly different characteristics, thus did not fall within the rule.

Following another Barrow Report recommendation, the FCC started a proceeding July 13, 1962, to consider making network-affiliate contracts public.[53] The 1957 Antitrust Subcommittee of the House Judiciary Committee also had deemed that affiliate contracts should be made a matter of public record. The subcommittee said its

> study of the agreements reveals existence of widespread, arbitrary and substantial differences in terms accorded each network to individual affiliates, particularly in respect of station compensation for network broadcasting services. The differences primarily favor larger multiple-station licensees vis-a-vis small, independent operators.[54]

A rule was adopted March 25, 1969, making the contracts filed after May 1 open to the public. A copy had to be available in a station's local files.

Starting in 1961, CBS attempted to improve its programs' clearances by a new plan of compensation with some affiliates: the amount a station received for carrying each CBS program varied sharply with the total number of CBS programs carried. Compensation for carrying only a few programs was relatively small, but if the station carried more than 60 percent of such programs, it was paid at a much higher rate. This new plan differed substantially from the plan previously used by CBS and still used by other networks. The plan also hindered CBS affiliates from taking programs from other networks. The FCC said the effect of the plan was

to force affiliates to take CBS's full line of afternoon and evening programs, excluding those produced or supplied by other program producers. Accordingly, in 1962 the commission held that the plan violated Section 73.658 (a), forbidding arrangements that penalized a station for carrying another network's programs.

CBS amended its plan, but the FCC found in October 1962 that the plan violated Section 73.658 (e) by discouraging a station from carrying a non-network rather than a CBS program. Finally, the plan violated Section 73.658 (d), the rule amended May 1963 to prohibit option time or any arrangement having a similar restraining effect. The FCC said CBS attempted to frustrate the purpose of this latter rule, "which is to preserve a station's freedom to refuse network programs which a station reasonably believes to be unsatisfactory, unsuitable or contrary to the public interest. . . ."[55] The CBS plan was finally banned Nov. 20, 1963, after the FCC denied a CBS petition for reconsideration.[56]

Programing Inquiry

The Barrow Report contained little information on television programing because of the delay in going to court to force some independent program and distributing organizations to answer the committee's questionnaires. The FCC increased the scope of that portion of the report on Feb. 26, 1959, when it ordered an investigatory proceeding concerning network control over television programing and related matters. The investigation would include:

> policies, practices, mechanics and surveillance pursued and carried out by networks, station licensees and others in connection with the acquisition, ownership, production, distribution, selection, sale and licensing of programs for radio and television exhibition and policies and practices pursued by networks, station licensees and others in connection with selection, presentation and supervision of advertising materials broadcast to the public and reasons for such policies.[57]

All that, in order to determine if more detailed and precise standards were needed for the guidance of broadcasters. From May 1959 until early 1962, hearings were held. The FCC decided Nov. 9, 1959, to add to the list of considerations under discussion whether FCC authority was adequate or whether new legislation should be recommended.

The commission's Order for Investigatory Proceeding, given Feb. 26, 1959, detailed topics to be investigated. The study was to include:

a) the extent to which networks had achieved control of television programs;

b) the extent of network ownership or control of programs for television exhibition that was desirable in the public interest;

c) the extent to which networks excluded programs not under their control;

d) the extent to which networks required financial interest in independently produced programs as a condition for exhibiting such programs; and

e) the participation of networks in the process of producing programs for television syndication.[58]

The FCC's power to regulate programing, proscribed as it is by Section 326, relies upon authority under the Communications Act of 1934 to grant licenses after a determination that the public interest, convenience or necessity will be served. Realizing this, the FCC from time to time has laid down certain general standards for guidance of licensed broadcasters in the exercise of their responsibility. Such indirect FCC action is known throughout the industry as "lifted eyebrow" rule.

A not too subtle suggestion of program policies was first issued in March 1946 in the 149-page **Public Service Responsibility of Broadcast Licensees**, which amounted to a stinging indictment of broadcasters.[59] The document became known as the Blue Book. **Variety** said the programing guidelines would be unnecessary if the public made broadcasters "toe the mark."[60] The FCC's suggestions prompted a more elaborate self-regulatory National Association of Broadcasters' code.

In June 1960 the Office of Network Study presented the FCC with an interim report entitled "Responsibility for Broadcast Matter." On July 22 the commission issued the well-known "Report and Statement of Policy in re En Banc Programing Inquiry," often called the 1960 program policy statement. The report found two affirmative duties requisite to broadcasting in the public interest: ascertaining and serving diverse community programing needs and maintaining control of all aired programs.[61] This means the programing duty cannot be delegated to networks. The duties trace back to the theoretical underpinning of commercial broadcasting — the primacy of local needs over national service. The FCC gave as examples of these local needs programs involving local talent, educational topics, editorializing, public affairs, children's shows, news, weather and sports.[62]

Following the report's release, hearings were conducted to obtain comments on the topics broached. Program packagers and producers were heard in Los Angeles in October 1960; writers, directors and entertainment personalities spoke in New York in June 1961; in September the advertisers had their day. The hearings prompted increased public comment concerning television fare. The FCC reported receiving 1,150 pieces of mail the last three months of 1960 and 4,300 letters the first five months of 1961. Nearly 1,800 complained about program balance, individual programs and profanity; more than 500 complained of excessive crime and violence; 390 complained of slanted news and editorializing; 570 lauded FCC efforts.[63] Hearings concluded in early 1962 after more than 10,000 pages of testimony by 200 witnesses.[64]

Part I of the second interim report, "Television Network Program Procurement," was made public in December 1962. The report described for the first time in public record the overall television network procurement process and the role of each of several components of the industry. Part I suggested FCC action to foster and maintain a more competitive climate in the network television program market.

On March 19, 1965, the FCC issued a Notice of Proposed Rule Making on the basis of the investigation, concluding that television networks had gradually over the years "acquired an undue degree of control over the programing process which tends to restrict development of independent program sources and inhibit a licensee's ability to provide broadcast service in terms of discoverable needs and interests of local communities."[65] The FCC said the three networks "for all practical purposes control the entire network television production process from idea through exhibition."[66] In the entertainment program category, the number of hours controlled or produced by networks rose from 64 percent in 1957 to more than 96 percent in 1968. Programs produced by independent producers dropped from 33⅓ percent in 1957 to 5 percent in 1968. Of 244 stations in the

top 50 markets, 153 were network affiliates.[67] The proposed rule would limit network ownership to 50 percent of prime time programs.

PTAR-I

On May 4, 1970, "Prime Time Access Rules" (PTAR-I) were adopted as Section 73.658 (k). The "financial interest" and "syndication" rules were approved very much as proposed, barring network acquisition of interests in programs other than the right to network exhibition and barring networks from U.S. syndication activity entirely and foreign syndication of all except wholly network-produced programs. PTAR-I provided that network affiliates in the top 50 television markets could carry no more than three hours of network programs, and the one hour thus cleared could not be filled with off-network material (programs previously run on the network) or films shown within the last two years. Prime time was defined as 7-11 p.m. Eastern and Pacific time and 6-10 p.m. Central and Mountain time. With slight modifications, PTAR became effective Oct. 1, 1971. In May 1971 a circuit court affirmed syndication, financial interest and PTAR. CBS was given until June 4, 1973, to divest stock in Viacom International, Inc., a corporation that had taken over its syndication activities, program interests and cable television holdings. ABC and NBC had until June 1, 1973, to comply with the rules.[68]

The goal was to reduce network control or domination of television programing, to open valuable prime time to first-run syndicated or local programs and to offer licensees a greater opportunity to exercise judgment and responsibility in programing their stations to meet the needs and interests of their coverage areas. In practice, networks generally gave up the 7-8 p.m. Eastern time slot to local stations. This resulted in an across-the-board decline in weekly network access time from 24 hours to 21 hours.[69]

Between early 1971 and mid-1975, the FCC granted a multiplicity of waivers under PTAR-I. Waivers included: in 1971, grants to NBC and ABC to program three-and-a-half hours on one night a week balanced by a reduction to two-and-a-half hours on another night; in 1971 and later, grants to run network news the first half hour of prime time, without counting toward the allowed three hours, if preceded by a full hour of local news; waivers for special news programs, sports runovers and certain off-network programs such as "Wild Kingdom."[70]

PTAR-II

Complaints about the rule's effect and petitions by the networks asking repeal forced the FCC to start another inquiry on Oct. 26, 1972. Comments were filed through early 1973 and oral arguments heard July 30 and 31. On Jan. 23, 1974, the FCC decision adopted PTAR-II, a form of rule that reduced the amount of prime time cleared of network and off-network programs. Changes were to be effective September 1974.

The initial "Prime Time Access Rules" changed significantly. There were five basic changes:

1) All restrictions were removed from Sundays.

2) All restrictions were removed from the first half hour of prime time on other days (7-7:30 p.m. ET).

3) Remaining cleared time was established as 7:30-8 p.m. Monday through Saturday.

4) One of the six cleared half hours was to be used for network or off-network programs of a certain type — documentaries, public affairs shows and children's specials.

5) Feature films were barred entirely from the air during the cleared six half hours.[71]

The National Association of Independent Television Producers and Distributors appealed the FCC decision, saying the time allowed before the rules took effect was too short. In March 1974 the appeals court agreed and enjoined the FCC from putting the changes into effect before September 1975 but did not rule on PTAR-II itself. Instead, the court suggested the FCC obtain views from consumer and minority groups about the efficacy of the rules. On July 9, 1974, the FCC formally invited those comments. Of the 17 public groups that responded, all but one supported the original rules and opposed PTAR-II. A Department of Justice opinion supported the original rule. PTAR-II was never revived.

PTAR-III-A

The furor over PTAR-II caused the FCC to issue another order May 13, 1975, adopting PTAR-III-A, which went into effect Sept. 8, 1975, and remains in effect. The rule is similar to PTAR-I with some exceptions that represent waivers regularly granted and new provisions as to the use of feature films. Exempt from network and off-network programing are programs designed for children (ages 2 through 12), public affairs programs and documentary programs. The FCC admonished broadcasters, "We must always keep foremost in our minds the interests of the viewing public rather than the interests of private parties."[72]

The FCC PTAR-III-A ruling stressed the need for access of certain kinds of material to prime time. The commission felt the importance of some programs outweighed the concern as to source, thus the specific exemptions mentioned above. The particular importance of Saturday night programing opportunities was enunciated. Networks were cautioned to avoid incursion into that period unless there were compelling public interest reasons to do so. Since rules dealing with the programing aspects of television may seem to run counter to the spirit of Section 326, the FCC hastened to add: "We point out that the commission does not violate the First Amendment in interesting itself in the general programing formats and the kinds of programs broadcast by licensees."[73]

New Network Investigation

Westinghouse Broadcasting Company, Inc. (Group W) petitioned the FCC Sept. 3, 1976, seeking a broad, in-depth investigation of network practices and alleged high degree of dominance. The Washington Star reported (9-4-76) that Group W wanted the FCC to freeze the time networks program for local stations and to require networks to give affiliates reasonable opportunity to preview programs. The FCC responded Jan. 14, 1977, with a Notice of Inquiry. The inquiry will concern commercial television network practices and policies regarding the acquisition and distribution of television programing. It will encompass the alleged dominance of the commercial television industry by three major commercial networks, focusing specifically on the relationship between these networks and their affiliate stations. The inquiry also will determine whether the networks have maintained anti-competitive policies that unduly restrict the development of other programing sources. The scope of the investigation is similar to that of the Barrow Report 20 years ago. But the initiation of the investigation resembles the original radio network study of the early 1940s.

In this instance, Group W plays the Mutual Broadcasting Service role of a company wishing to enter the field but finding itself screened out. The Justice Department also filed comments in support of the investigation. The department is currently litigating antitrust complaints, where the FCC has no jurisdiction, against the three networks in the central district of California.

The FCC recognizes, as it has in the past, the vital contributions networks have made to development of the television medium. Nonetheless:

> While it is certainly not our intention to adopt any regulatory measures which would impair the ability of the networks to serve the public interest, we must assure ourselves that the networks are not engaging in practices which might unduly encroach on the discretion of our licensees, or unnecessarily restrict the development of new sources of television programing.[74]

The FCC notice says network affiliates number more than 75 percent of all U.S. commercial television stations, approximately 600 out of slightly more than 700. The Washington Star reported (9-4-76) that since 1960, network programing on affiliate stations has increased. In 1960 ABC programed 43 percent, CBS 57 percent and NBC 63 percent; in 1976 ABC had 64 percent, CBS and NBC 68 percent. Each network has five owned-and-operated stations through which they reach about 22 percent of the U.S. audience. For economic reasons, virtually all regularly scheduled network programs are either obtained by networks directly from an independent producer or produced by themselves. Therefore, the type of programing available to the American public has shifted from advertisers to networks. While network expenditures increased by 13.6 percent between 1960 and 1975, total net income rose 32 percent annually during the same period. All U.S. businesses increased at an average annual rate of 12 percent.[75] Group W alleges station compensation has not kept pace.

Comments were to be filed by May 2, 1977. The FCC, unlike past investigations, decided not to form a supervisory committee of several commissioners. Chairman Richard Wiley said the current study will be "more sharply focused" than previous reports. **Broadcasting** reported (5-4-77) that the study staff will consist of five or six full-time professionals, two researchers, two secretaries and one or two outside consultants. A commission report is not expected until early 1978.

Radio Rules Repealed

At least one instance of lessened FCC control is now visible. The commission started a review of its rules concerning network broadcasting by commercial AM and FM radio stations on Feb. 19, 1976. **Broadcasting** reported (3-21-77) that the 375-page report (40 RR 2nd 80) repeals most of the 1943 radio network rules. A redefinition of network as a programing source that "entirely or chiefly" by interconnection is capable of simultaneous presentation allows the inclusion of Associated Press Radio and United Press International Audio into the category.

The territorial exclusivity rule is retained as is, to promote wide availability of network programing. The report said there were now 10 conventional networks operated by five companies, as well as special, temporary state and regional sports networks. Some numbers emphasize the difference between 1941 and now. In 1941 there were less than 1,000 AM and 25 FM stations; now there are more than 8,000 total radio stations.[76] The statistics imply vindication of the FCC decisions following the 1940s report. Network economic impact is much less than in 1941, with only 3 percent of 1975 revenues accounted for by networks. The nature of network service is changed also. It is not mostly entertainment programs, as it was in 1941 and as the bulk of network television is now, the report says.

The rules became effective Sept. 1, 1977, but the FCC concluded on a warning note: "If industry patterns develop in a manner inconsistent with these concepts, a reexamination of the subject to see if there is a need to reimpose rules would be in order."[77]

Conclusion

Beginning in the 1940s, the history of FCC regulation of networks is extensive, actually going beyond the rules discussed herein when one includes instances of "lifted eyebrow" control. But the overriding concern of the FCC has been to maintain "community broadcasting" in the "public interest." The latest inquiry into television networks comes at a time, as did previous inquiries, when networks are assailed by the Justice Department and Congress. The **Congressional Record** reported March 3, 1977, the summary of a bill (H.R. 4452) calling for regulation of network programing activities and limiting networks to one owned-and-operated station. We can but wait to see if the outcome will be similar to the 1940 report and subsequent activity.

FOOTNOTES

1. **Red Lion Broadcasting Co. v. FCC**, 395 US at 390 (1969).
2. Martin J. McManus Jr., "Federal Legislation Regulating Radio," **Southern California Law Review**, February, 1947, p. 147.
3. Daniel L. Brenner, "The Limits of Broadcast Self-Regulation Under the First Amendment," **Federal Communications Bar Journal**, 1976, p. 3.
4. Sydney W. Head, **Broadcasting in America** (Boston: Houghton Mifflin Co., 1972), p. 147.
5. Ibid.
6. Llewellyn White, **The American Radio** (Chicago: University of Chicago Press, 1947), p. 14.
7. Walter K. Kingson, Rome Cowgill and Ralph Levy, **Broadcasting Television and Radio** (New York: Prentice-Hall, Inc., 1955), p. 165.
8. White, p. vi.
9. Lawrence W. Lichty and Malachi C. Topping, **American Broadcasting** (New York: Hastings House, Inc., 1975), p. 66.
10. Thomas E. Billings, "The FCC's Battle Against Network Contract Practices," paper submitted to Freedom of Information Center, University of Missouri, 1971, p. 3. (Typewritten.)
11. White, p. 162.
12. "Inside the FCC," **Television-Radio Age**, Jan. 17, 1977, p. 69.
13. Billings, p. 7.
14. Ibid., p. 8.
15. Ibid., p. 13.
16. FCC, **7th Annual Report** (Washington: U.S. Government Printing Office, 1941), p. 22.
17. Ibid.
18. McManus, pp. 166-67.
19. White, p. 162.
20. FCC, **7th Annual Report**, p. 23.
21. Ibid.
22. Ibid., p. 24.
23. Ibid.
24. Billings, p. 17.
25. McManus, p. 167.
26. White, p. 162.
27. "Inside the FCC," p. 69.
28. Glen O. Robinson, "The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation," **Minnesota Law Review**,

November, 1967, p. 87.
29. NBC, Inc. v. FCC, 319 US at 226 (1943).
30. 319 US at 215-16.
31. Oren G. Barber, "Competition, Free Speech and FCC Radio Network Regulations," George Washington Law Review, December, 1943, p. 49.
32. White, p. 168.
33. "Inside the FCC," p. 70.
34. Federal Register, Jan. 14, 1958, p. 262.
35. Roscoe L. Barrow, "Network Broadcasting -- The Report of the FCC Network Study Staff," Law and Contemporary Problems, Autumn, 1957, p. 612.
36. "Network Investigation -- Statement by Network Study Committee of Purposes and Objectives of the Network Study," Pike and Fischer Radio Regulation, Report No. 16-24, June 26, 1963, p. 34:2.
37. Barrow, p. 613.
38. FCC, 24th Annual Report (Washington: U.S. Government Printing Office, 1958), p. 179.
39. "Inside the FCC," p. 70.
40. FCC, 24th Annual Report, p. 121.
41. Barrow, p. 615.
42. FCC, 26th Annual Report (Washington: U.S. Government Printing Office, 1960), p. 45.
43. Barrow, p. 617.
44. Ibid., p. 619.
45. Ibid., p. 621.
46. Ibid., p. 623.
47. "Inside the FCC," p. 70.
48. FCC, 27th Annual Report (Washington: U.S. Government Printing Office, 1961), p. 50.
49. FCC, 25th Annual Report (Washington: U.S. Government Printing Office, 1959), p. 44.
50. FCC, 26th Annual Report, p. 46.
51. FCC, 25th Annual Report, p. 45.
52. FCC, 29th Annual Report (Washington: U.S. Government Printing Office, 1963), p. 71.
53. FCC, 28th Annual Report (Washington: U.S. Government Printing Office, 1962), p. 57.
54. Ibid.
55. FCC, 29th Annual Report, p. 72.
56. FCC, 30th Annual Report (Washington: U.S. Government Printing Office, 1964), p. 72.
57. "Network Investigation -- Supplemental Order for Investigatory Proceeding," Pike and Fischer Radio Regulation, Report No. 17-4, Feb. 5, 1964, pp. 34:7-8.
58. "Network Investigation -- Order for Investigatory Proceeding," Pike and Fischer Radio Regulation, Report No. 17-4, Feb. 5, 1964, p. 34:5.
59. White, p. 184.
60. Lichty and Topping, p. 591.
61. Brenner, p. 52.
62. FCC, 27th Annual Report, p. 38.
63. Ibid., p. 39.
64. FCC, 28th Annual Report, p. 60.
65. FCC, 35th Annual Report (Washington: U.S. Government Printing Office, 1969), p. 48.
66. FCC, 36th Annual Report (Washington: U.S. Government Printing Office, 1970), p. 38.
67. Ibid.
68. FCC, 38th Annual Report (Washington: U.S. Government Printing Office, 1972), p. 44.
69. "PTAR-III-A," 50 FCC 2nd at 831 (1975).
70. "Inside the FCC," p. 70.
71. FCC, 40th Annual Report (Washington: U.S. Government Printing Office, 1974), pp. 23-4.
72. 50 FCC 2nd at 837.
73. 50 FCC 2nd at 847.
74. "Commercial Television Network Practices and the Ability of Station Licensees to Serve the Public Interest," FCC 77-53, Docket No. 21049 (RM 2749), Notice of Inquiry, Jan. 14, 1977, para. 7.
75. Ibid., para. 12.
76. 40 RR 2nd at 84, March 23, 1977.
77. 40 RR 2nd at 97.